No. 17-647

In the Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, ET AL.,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE FOR THE AMERICAN FARM BUREAU FEDERATION, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND CATL FUND IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The American Farm Bureau Federation, National Cattlemen's Beef Association, and CATL Fund submit this brief as *amici curiae* in support of petitioner.[1]

The American Farm Bureau Federation (Farm Bureau) is a voluntary national membership organization with nearly six million member families in all 50 states and Puerto Rico. Established in 1919, the Farm Bureau's primary purpose is to advance and promote the interests and betterment of farming and ranching; the farming, ranching, and rural community; and the individual families engaged in farming and ranching. This effort involves protecting, promoting, and representing the business, economic, social, and educational interests of American farmers and ranchers.

The National Cattlemen's Beef Association (NCBA) is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief by blanket consent.

be an advocate for the cattle industry's policy positions and economic interests.

The CATL Fund is an organization that assists landowners and others similarly situated, including cattlemen, in establishing broad-based legal precedent to protect property rights, promote free enterprise, and minimize regulatory abuses.

The exhaustion/ripeness rules invented in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), have for three decades blocked farmers' and ranchers' pursuit of takings claims to recover compensation for government actions that reduce the value of their land or business. *Williamson County*'s requirement that a plaintiff exhaust state judicial remedies before an inverse condemnation claim is ripe in federal court adds enormously to the duration and expense of a takings claim—often making litigation too costly to contemplate. And state court litigation generally makes a later federal suit pointless, because state court determinations have preclusive effect in later federal actions. Making an *England* reservation of federal rights to address this preclusion problem is ineffective, as this Court held in *San Remo Hotel, L.P.* v. *City and County of San Francisco*, 545 U.S. 323 (2005).

For takings plaintiffs, this combination of exhaustion, ripeness, and preclusion presents a bleak prospect. It bars the federal courthouse door to most federal takings claims. Farmers and ranchers are left to state court actions to try to protect their constitutional property rights against state and local government officials, with no hope of obtaining federal relief unless lightning strikes in the form of a grant

of certiorari from this Court to review the final state court judgment.

These barriers to vindicating individual constitutional rights rest on errors that it is time to correct. *Amici* focus this brief on two issues that support the need for this Court to abandon *Williamson County*.

First, no other claim under our Bill of Rights has to be ripened in this costly, time-consuming, and cumbersome way. Final action by state and local government officials is typically enough to give rise to a federal constitutional claim, without first testing that claim in state court. This Court's decisions identify no plausible basis for applying a different rule to just compensation claims.

Second, this Court should not follow *Williamson County* merely as a matter of *stare decisis*. Its 30 years in effect have made it not venerable, but instead have exposed its lack of a solid foundation and its dire practical consequences. None of the principles that make *stare decisis* generally beneficial apply here to justify perpetuating so faulty a decision.

Williamson County's procedural limitations to protecting property rights in federal court would be unrecognizable to the Framers of the simple and direct mandate of the Takings Clause. *Amici* have a strong interest in having this Court rein in the exhaustion/ripeness doctrine to afford America's farmers and ranchers a fair opportunity to vindicate their federal rights to just compensation in a federal forum.

SUMMARY OF ARGUMENT

This Court should overrule *Williamson County*'s state-litigation requirement. That requirement bars

farmers and ranchers from obtaining federal court remedies for state and local government violations of the Takings Clause. No other right secured by the Bill of Rights is treated this way. The barrier that this Court constructed in *Williamson County* violates our constitutional design and the intent of the Reconstruction Congress that adopted the Fourteenth Amendment and enacted Section 1983. *Stare decisis* does not protect this erroneous decision.

I. The Framers regarded protection of private property as a keystone right. They guaranteed that right in the Takings Clause, which they listed alongside other foundational rights like free speech, assistance of counsel, and due process of law. The Court should not make it harder for citizens to invoke their rights under the Takings Clause than other protections in the Bill of Rights.

Williamson County does precisely that. It prohibits land owners from seeking federal-court remedies under the Takings Clause until after they have exhausted all state judicial remedies. When combined with preclusion under the full faith and credit statute, *Williamson County* bars federal courts from reviewing state takings *at all*. It thereby relegates the Takings Clause to second-class status, allowing federal courts to guard against violations of every individual right in the Bill of Rights *except for* the Takings Clause.

There is no justification for treating the Takings Clause as a poor relation of the other protections in the Bill of Rights. The Court's three-paragraph discussion in *Williamson County* is thoroughly unconvincing, as is the Court's later attempt in *San Remo Hotel* to justify the doctrine.

Congress enacted Section 1983, providing for federal adjudication of violations of federal constitutional rights, because state governments and state courts were not adequately protecting those rights. In line with that purpose, the Court should overturn *Williamson County*'s state-litigation requirement and restore landowners' ability to seek federal court remedies against unconstitutional state takings.

When Congress intends to restrict access to federal courts to litigate federal constitutional claims, it says so. For example, it has specified that habeas corpus petitioners must exhaust state remedies before they may turn to federal court. But Congress placed no such restriction on rights under the Takings Clause. And this Court should not invent such restrictions without congressional action.

Williamson County's state-litigation requirement improperly makes the Takings Clause unenforceable in federal court when state or local governments violate the Constitution. The Court should overrule the requirement.

II. *Stare decisis* compels no different result. *Stare decisis* is at its weakest when this Court interprets the Constitution, and *Williamson County* purported to interpret the Takings Clause. This Court later shifted the rationale for the state-litigation requirement, turning it into a prudential rule. But when this Court makes shifting judge-made rules, *stare decisis* is weak. Both rationales thus significantly diminish the strength of *stare decisis* here.

Three decades of experience have proved the state-litigation requirement to be unworkable. The Court's language in *Williamson County* suggested that property owners would be able to litigate their

takings claims in federal court once they exhausted their state judicial remedies. But experience has shown that the preclusive effect of the state court litigation ends the federal cases at the start.

The Court's later attempts to recast the state-litigation requirement have spawned more confusion. There are now circuit splits on whether the state-litigation requirement is jurisdictional or prudential, and on whether the requirement is waivable. Some federal courts even have allowed state and local governments to remove takings claims from state court to federal court—which then dismisses the claims for failure to exhaust state remedies. These courts thereby prevent landowners from litigating their takings claims in *any* forum. The result is a charade that prevents the Takings Clause from serving as a bulwark protecting private property rights.

There are no serious reliance interests at stake. No private citizens have altered their behavior based on where they must litigate takings claims. If anything, *Williamson County* encourages unconstitutional takings because state and local governments know that there is no effective federal court oversight. That possibility is a reason to *overturn Williamson County*.

Williamson County's state-litigation requirement was not correct when it was decided, and it is not correct today. The Court should overturn the requirement and restore the Takings Clause to its rightful place as a foundational protection in the Bill of Rights.

ARGUMENT

The protection of individual property rights was a core concern of the Framers of the Constitution and

the Bill of Rights. The Framers regarded it as "the first object of government." THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). The Fifth Amendment's Just Compensation or Takings Clause—which applies to the States through the Fourteenth Amendment (*Chi., B. & Q. R.R. Co.* v. *City of Chi.*, 166 U.S. 226 (1897))—lies at the very heart of the constitutional design. See Jennifer Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 9 (1990) (private property supplied "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government"); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 270 (1988) ("protection of private property was a nearly unanimous intention among the founding generation").

It is no secret that, despite the central role of property rights in our Constitution, protecting those rights through takings litigation is fraught with difficulties. Difficult-to-satisfy takings tests that apply to different types of government actions—all well worth this Court revisiting—have made the winning takings plaintiff a rare animal. No lawyer navigating this minefield could ever predict success in a takings suit.

But this case is about a procedural barrier that dooms most inverse condemnation claims *from the very start*, before federal courts even have the opportunity to apply the tests in *Loretto*, *Lucas*, *Dolan/Nollan*, or *Penn Central/Pennsylvania Coal*. In *Williamson County* this Court held that "because the Constitution * * * is satisfied by a reasonable and

adequate provision for obtaining compensation after the taking, the State's action is not 'complete'"—the fact or extent of the taking is not known—"until the State fails to provide adequate compensation for the taking." 473 U.S. at 195. On this analysis, no taking occurs until the state courts deny adequate compensation. As a result, this Court held, no federal claim for just compensation ripens until the plaintiff has exhausted state court remedies and thereby "fixed" the scope of any taking.

San Remo Hotel then magnified the adverse impact of *Williamson County* on takings plaintiffs. It applied the full faith and credit statute to bind federal courts to rulings made in the required state court litigation, which precludes a federal remedy in most cases. *San Remo Hotel*, 545 U.S. at 326-327. "*San Remo Hotel* dooms plaintiffs' efforts to obtain federal review of a federal constitutional claim even after the plaintiffs comply with *Williamson County*'s exhaustion requirement." *Arrigoni Enters., LLC* v. *Town of Durham*, 136 S. Ct. 1409, 1411 (2016) (Thomas and Kennedy, JJ., dissenting from denial of certiorari).

These doctrines generate additional peculiarities. For example, the exhaustion requirement creates particular problems in states, such as Ohio, that provide no cause of action for inverse condemnations. See Brief *Amicus Curiae* for the Ohio Farm Bureau Federation, in which *amici* here concur. And the doctrines invite "gotcha" litigation tactics in which a defendant removes a takings claim from state to federal court under 28 U.S.C. § 1441. See *City of Chi.* v. *Int'l Coll. of Surgeons*, 522 U.S. 156, 161 (1997). The defendant then seeks to have the removed suit dismissed by the federal court for failure to exhaust

state court remedies. See *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.) ("This gamesmanship leaves plaintiffs with *no* court in which to pursue their claims").

The consequence of all this is that it is "almost impossible for federal courts to remedy violations of the Just Compensation Clause." Max Kidalov & Richard H. Seamon, *The Missing Piece of the Debate over Federal Property Rights Litigation*, 27 HASTINGS CONST. L.Q. 1, 5 (1999). That relegation of Fifth Amendment rights to second-class status is unjustified. The precedent that caused it, *Williamson County*, does not meet the standards for *stare decisis* and should be overturned.

I. *Williamson County*'s Ripeness Rules Make The Takings Clause The Poor Relation Of Other Provisions Of The Bill Of Rights.

A. The Framers of our Constitution placed property rights on an equal footing with other civil rights guaranteed in the Bill of Rights. See THE FEDERALIST NO. 54, *supra*, at 339 (James Madison) (government is "instituted no less for the protection of the property, than of the persons, of individuals"). Protection of property "was regarded by the framers" as "an essential precondition to the realization of other basic civil rights and liberties." *Shelly* v. *Kraemer*, 334 U.S. 1, 10 (1948). This Court thus has said that there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994).

But *Williamson County* does exactly that. It creates an exception to the usual principles of federal

jurisdiction by insisting that a plaintiff cannot immediately bring a federal takings claim in federal court, but must instead litigate the claim all the way through the state court system—at which point rules of preclusion and *res judicata* bar federal court relief. The effect is that "in most instances the final word of the state supreme court in a land use case is the final word, period," given this Court's limited capacity for additional review. David A. Dana & Thomas W. Merrill, PROPERTY: TAKINGS 264 (2002).

That works an extraordinary limitation on access to the federal courts. As two leading scholars have explained, "Section 1983—the primary vehicle by which citizens seek damages for federal constitutional wrongs committed by state or local officials—has no exhaustion requirement." Dana & Merrill, *supra*, at 262 (citing *Patsy* v. *Fla. Bd. of Regents of Fla.*, 457 U.S. 496, 500-516 (1982)). To the contrary, the "general rule" is that

> plaintiffs who believe that they have been deprived of some federal constitutional right by state or local officials acting under color of law may bring an action in federal district court under [Section] 1983 without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available. For example, when an individual claims that his Fourth Amendment rights have been violated by an unwarranted search or seizure, he may bring a Section 1983 action without first bringing a state court tort action for trespass or battery.

Ibid. Why should takings claimants be treated differently, precluding them from ever vindicating their federal constitutional rights in federal court?

B. This Court's three-paragraph discussion in *Williamson County* offers no persuasive explanation for this stark difference in treatment. The Court referred to the "the special nature of the Just Compensation Clause." 473 U.S. at 196 n.14. Supposedly, because the clause allows government to take private property provided it pays just compensation, a "property owner 'has no claim against the Government for a taking'" if the plaintiff's resort to "an adequate process for obtaining compensation * * * 'yield[s] just compensation.'" *Id.* at 194-195. An "adequate post-deprivation remedy" prevents the takings claim from arising. *Id.* at 195.

But the *substantive* adequacy of the state court's decision is never tested in federal court because of preclusion rules. Owners thus never find out whether a takings claim truly arose. The "special nature" of the Takings Clause, under *Williamson County*, is that federal courts can rarely pass on whether the federal takings claim arose.

Justice Stevens' majority opinion in *San Remo Hotel* offered another justification for singling out takings claims for adverse treatment: state courts "have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." 545 U.S. at 347. But federal courts are hardly unfamiliar with state property law. For example, this Court has often addressed the state law curtilage concept in Fourth Amendment decisions such as *United States* v. *Dunn*, 480 U.S. 294, 300 (1987). And federal courts are the source of every important substantive takings standard. If the "familiarity" rationale were sufficient, as Chief Justice Rehnquist pointed out in his concurrence in *San Remo Hotel*, it

"would apply to any number of federal claims," including, "for example, challenges to municipal land-use regulations based on the First Amendment." 545 U.S. at 350-351.

C. A more telling question is why takings claims should not fall under Section 1983 like other civil rights claims. Constitutional rights vary widely, yet all fit under the Section 1983 umbrella absent Congressional direction to the contrary—except the Just Compensation Clause.

Congress in Section 1983 provided litigants a federal remedy for deprivations of their federal rights committed under color of state law. 42 U.S.C. § 1983. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972). And federal question jurisdiction under Article III and 28 U.S.C. § 1331 entitles a plaintiff alleging a violation of the Takings Clause to choose a federal forum. The Reconstruction Congress drew no distinction in Section 1983 between different civil rights: the statute applies to "the deprivation of *any* rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (emphasis added).

Plaintiffs alleging that state or local officials have taken their property without just compensation may be forgiven for doubting that they will get a fair shake in state courts. Those courts are often staffed by elected judges, and the costs of providing compensation would fall on local governments and ultimately on local taxpayers (and voters). See *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (the Fifth Amendment ensures that government may not

"forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). In fact, skepticism about state courts' willingness to hold state and local officials to federal constitutional requirements lay behind the enactment of Section 1983. The Reconstruction Congress "displayed no solicitude for state courts." *Briscoe* v. *Lahue*, 460 U.S. 325, 363 (1983). Far from it, the "debates over the 1871 Act are replete with hostile comments directed at state judicial systems." *Id.* at 363-364.

D. To be sure, plaintiffs cannot vindicate every constitutional right immediately in federal court. But exceptions to the general rule that federal courts provide a federal remedy for constitutional violations must be established by "congressional directive" or careful justification. *San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring in judgment).

Congress has "clearly required exhaustion of adequate state remedies" when it intends to require a constitutional plaintiff to go to state court before pursuing a claim in a federal forum. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-490 (1973). That is the case for habeas corpus claims by state prisoners. 28 U.S.C. § 2254(b) requires a habeas corpus applicant in federal court to "ha[ve] exhausted the remedies available in the courts of the State" or have shown that those remedies are non-existent or "ineffective."

"[L]ongstanding principle[s] of comity" between federal and state jurisdictions, reflected in federal statutes like the Tax Injunction Act, also displace the usual rule. *San Remo Hotel*, 545 U.S. at 339 (majority), 349-350 (concurrence).

Neither exception applies here. Congress has never carved the Just Compensation Clause out of Section 1983 or erected a habeas-corpus-like bar to takings claims. Nor has it embraced strong comity principles towards state determination of takings claims comparable to its insulation of state tax regimes from direct federal challenge in the Tax Injunction Act, 28 U.S.C. § 1341.

E. While the reasons for the *Williamson County* rule are "suspect," its "impact on takings plaintiffs is dramatic." *San Remo Hotel*, 545 U.S. at 352 (Rehnquist, C.J.). The exhaustion requirement serves as an unfair means test for entry into federal court. Only those with huge financial resources and the stamina to outlast government bureaucracies can hope to satisfy this test of endurance all the way through the state court system. See Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. WESTERN L. REV. 1, 11 (1992) ("The time and money required to comply with myriad ripeness requirements will prevent most middle-class property owners from pursuing their constitutional right to just compensation [and] * * * make substantive review virtually impossible"); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 43 (1995) ("Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small").

If a rare takings plaintiff survives this gauntlet, he likely will have no federal remedy anyway. Preclusion and *res judicata*, endorsed by this Court in *San Remo Hotel*, make sure of that. Though a federal takings claim may be "nominally permissible" after

exhausting state court remedies, it is in practice "pointless." Dana & Merrill, *supra*, at 264. Surveys during the 1990s showed that 80 to 90 percent of takings claims were dismissed from federal court on ripeness or abstention grounds. See John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 203-204 (1999); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994).

F. In short, *Williamson County* "has downgraded the protection afforded by the Takings Clause to second-class status." *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.). "Plaintiffs alleging violations of other enumerated constitutional rights ordinarily may do so in federal court without first availing themselves of state court." *Ibid.* And this relegation to poor relation status is unjustified. Neither "constitutional [n]or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim." *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J.); see also *Arrigoni Enters.*, 136 S. Ct. at 194 (state litigation rule is "ahistorical, atextual, and anomalous").

This Court should end the *Williamson County* anomaly and restore the Fifth Amendment to its proper place among the other provisions of the Bill of Rights.

II. *Stare Decisis* Does Not Justify Continued Adherence To *Williamson County*.

Stare decisis does not require keeping in place this Court's erroneous decision in *Williamson County*. "*[S]tare decisis* is not an inexorable command." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). This Court "overrule[s] prior decisions where the necessity and propriety of doing so has been established." *Hurst* v. *Florida*, 136 S. Ct. 616, 623 (2016). That test is easily satisfied here. Both the necessity and propriety of overruling *Williamson County* are compelling.

A. "The force of *stare decisis* is at its nadir" in this case. *Alleyne* v. *United States*, 570 U.S. 99, 116 n.5 (2013). *Stare decisis* "is at its weakest" when this Court interprets the Constitution, because this Court's "interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions." *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997); see also *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014) (contrasting the "special force" of *stare decisis* in statutory cases). And *stare decisis* is especially weak in cases "concerning procedural rules that implicate fundamental constitutional protections"—exactly what is at issue here. *Alleyne*, 570 U.S. at 116 n.5.

Those principles greatly diminish the force of *stare decisis* here. "The Court in *Williamson County* purported to interpret the Fifth Amendment in divining th[e] state-litigation requirement." *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J.). The Court incorrectly "reasoned" that the "language" of the Takings Clause "does not 'require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reason-

able, certain and adequate provision for obtaining compensation exist at the time of the taking.'" *Arrigoni Enters.*, 136 S. Ct. at 1409 (Thomas and Kennedy, JJ.) (quoting *Williamson County*, 473 U.S. at 194). That *Williamson County* interpreted the Takings Clause—a fundamental constitutional protection—means that *stare decisis* is at its lowest ebb.

This Court later switched the rationale for *Williamson County*—a sure sign that the case was wrongly decided. Instead of treating the state-litigation rule as a substantive requirement of the Takings Clause, this Court turned it into a "prudential requirement." *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J.); see *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.) ("As early as 1992, the Court began to recast the state-litigation rule"). When this Court makes shifting judge-made law in this way, rather than interprets statutory text, the force of *stare decisis* is weak. *E.g.*, *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899 (2007). Indeed, it is "particularly appropriate" to "[r]evisi[t] precedent" when, as here, "the precedent consists of a judge-made rule" intended "to improve the operation of the courts." *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009).

Thus, no matter which of the Court's changing justifications best explains *Williamson County*'s rule, *stare decisis* provides an anemic defense for retaining that incorrect decision.

B. "[W]hen this Court has confronted a wrongly decided, unworkable precedent," it has "chosen not to compound the original error, but to overrule the precedent." *Payne* v. *Tennessee*, 501 U.S. 808, 842-843 (1991) (Souter and Kennedy, JJ., concurring). The Court should follow that course here.

This Court did not have the benefit of briefing on the critical issues it decided in *Williamson County*, and as a result the decision was not well or fully reasoned. Except for a single paragraph in the Summary of Argument section of the Solicitor General's *amicus* brief, none of the twelve merits briefs in *Williamson County* argued for the state litigation requirement. See Br. for U.S. as *Amicus Curiae* Supporting Pet'rs at 10 (No. 84-4) (Nov. 15, 1984).

Misled by this inadequate exploration of the issues, the Court in *Williamson County* inadvertently set a trap for property owners by failing to consider preclusion. The Court clearly thought that the claim at issue could eventually ripen and be heard in a federal forum. 473 U.S. at 194 ("the taking claim is not *yet* ripe") (emphasis added); *id.* at 195 ("the property owner cannot claim a violation * * * until it has used the procedure"). But the Court did not consider the full faith and credit statute, 28 U.S.C. § 1738, which precludes litigation in federal court once a property owner complies with *Williamson County*'s state-litigation requirement.

Courts of appeals spotted this trap and tried to dodge it. To avoid the unfair and constitutionally suspect results of the exhaustion rule, these courts declined to apply full faith and credit to state court judgments. *E.g.*, *DLX, Inc.* v. *Kentucky*, 381 F.3d 511, 520-521, 523-524 (6th Cir. 2004) (avoiding the "unanticipated effect of *Williamson County*"); *Santini* v. *Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 127-130 (2d Cir. 2003) (avoiding the "ironic and unfair" "Catch-22" of *Williamson County*); *Front Royal & Warren Cty. Indus. Park Corp.* v. *Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998).

In *San Remo Hotel*, this Court disapproved these end-runs around the full faith and credit statute. But in doing so, the Court unleashed the full force of *Williamson County*'s exhaustion rule. In springing the preclusion trap on federal takings plaintiffs, *San Remo Hotel* made clear to the four concurring Justices that the "real anomalies" created by *Williamson County* justified reconsidering the decision. 545 U.S. at 351 (Rehnquist, C.J.).

The problems *Williamson County* generates have since become even worse. "[C]lever state-government attorneys have rendered a nullity even the chance at review in *state* court." *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.). State-government attorneys have removed federal takings claims filed in state court under 28 U.S.C. § 1441 and then "have moved to dismiss on the ground that 'the plaintiff did not litigate first in the state court.'" *Ibid.* Some federal courts have blessed this practice. *E.g.*, *Koscielski* v. *City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006). At that point, a plaintiff has "*no* court in which to pursue their [takings] claims." *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.).

In addition, the Court's attempts to change the rationale for *Williamson County*'s state-litigation rule "have spawned only more confusion in the lower courts." *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.). As described above, this Court converted *Williamson County*'s state-litigation requirement from a substantive demand of the Takings Clause to "a 'prudential,'" "not 'jurisdictional'" consideration—and prudential requirements generally can be "'waived.'" *Id.* at 1411 (citing *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Protection*, 560 U.S. 702, 729 (2010), and *Horne* v. *Dep't of*

Agric., 569 U.S. 513, 526 (2013)). Yet "several Courts of Appeals" continue to treat *Williamson County*'s rule as jurisdictional. *Id.* at 1412 (citing examples). And the courts that treat it as prudential "are divided over whether the rule may be waived." *Ibid.* (citing examples). This "quagmire" in "the lower courts is yet another reason" to overturn *Williamson County*. *Ibid.*

Experience has confirmed that *Williamson County*'s state-litigation rule inflicts an unworkable and severe deprivation of constitutional protections. It undercuts "[t]he very purpose of § 1983" to establish "the federal courts * * * as guardians of the people's federal rights." *Mitchum*, 407 U.S. at 242. The decision should be set aside.

C. Another reason why *stare decisis* does not protect *Williamson County* is that "[n]o serious reliance interests are at stake." *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010). *Williamson County* imposes a "procedural rul[e]" that "do[es] not govern primary conduct and do[es] not implicate the reliance interests of private parties." *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring). It simply slams shut the federal courthouse doors to a landowner seeking to vindicate her constitutional rights when her land has been taken by state or local government unconstitutionally.

It also makes no sense to talk about government reliance on a procedural rule about where to litigate constitutional deprivations. But even if state or local governments have relied on *Williamson County*, it is precisely that type of reliance that this Court must stamp out. State and local governments know that under *Williamson County* and *San Remo Hotel*, they may take private property without effective federal

court oversight. Those takings "have no claim on [this Court's] solicitude," and changing state and local practices by restoring teeth to the Takings Clause is "a small price to pay for the uprooting of th[e] weed" of *Williamson County*. *Hubbard* v. *United States*, 514 U.S. 695, 717 (1995) (Scalia, J., joined by Kennedy, J., concurring in part and concurring in judgment).

D. Finally, "criticism" of *Williamson County*'s state-litigation rule "has been substantial and continuing, disapproving of its reasoning in all respects." *Lawrence* v. *Texas*, 539 U.S. 558, 576 (2003). In *San Remo Hotel*, Chief Justice Rehnquist wrote in a four-Justice concurrence that "the affirmative case for the state-litigation requirement has yet to be made" and that the "justifications" for the requirement "are suspect, while its impact on takings plaintiffs is dramatic." 545 U.S. at 351-352. In *Arrigoni Enterprises*, Justices Thomas and Kennedy reaffirmed those conclusions, asked "whether there are any justifications for the ahistorical, atextual, and anomalous state-litigation rule," and called for its reconsideration. 136 S. Ct. at 1412.

Beyond those observations, courts and commentators have noted *Williamson County*'s "*Alice in Wonderland* quality" and described it as creating a "procedural morass," a "labyrinth," a "quagmire," a "Kafkaesque maze," a "fraud or hoax on landowners," a "weapon of mass obstruction," and a "Catch-22." Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 702-703 (2004) (cataloging courts' and commentators' characterizations of *Williamson County*).

It is beyond time for this Court to overrule *Williamson County*'s state-litigation requirement. The Court should restore the Takings Clause to a co-equal provision in the Bill of Rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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